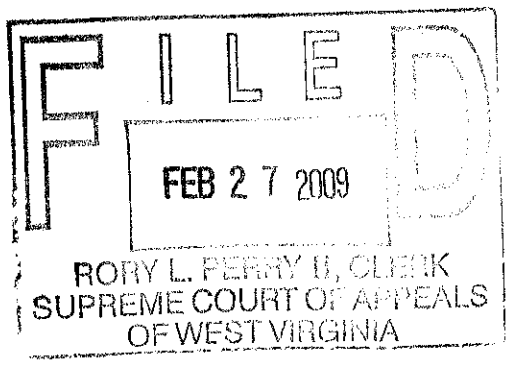
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

Leslie Equipment Company, a West Virginia corporation, Plaintiff Below, Appellee

vs.) No. 34712

Wood Resources Company, L.L.C., Christopher Todd Zach, individually and d/b/a/ Wood Resources Company, L.L.C., Ramona C. Goeke, individually and d/b/a Wood Resources Company, L.L.C., and Wendell L. Koprek, individually and d/b/a/ Wood Resources Company, L.L.C., Defendants Below

Christopher Todd Zach and Ramona C. Goeke, Appellants



BRIEF OF APPELLANTS, CHRISTOPHER TODD ZACH and RAMONA C. GOEKE

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I. KIND OF PROCEEDING AND NATURE OF RULING

Christopher Todd Zach and Ramona C. Goeke, Appellants and defendants in the action below, appeal an order of the Circuit Court of Wirt County, denying their motion to set aside a default judgment entered against them, based upon said judgment being void for lack of *in personam* jurisdiction, and to dismiss the action against them for said lack of jurisdiction.

The Wirt County court entered a default judgment in favor of the Appellee and plaintiff in the action below, Leslie Equipment Company (hereinafter, "plaintiff" or "Leslie"), on January 29, 2008, with said default judgment filed by the Circuit Clerk on February 1, 2008, awarding Leslie damages in the amount of $22,459.70, in addition to costs and interest. The Appellants filed a Motion to Set Aside Default Judgment and Dismiss Action Based upon Judgment Being Void for Lack of Jurisdiction on March 25, 2008. In an order entered on May 22, 2008, the Wirt County court denied the Appellants' motion, which order Mr. Zach and Ms. Goeke presently appeal.

II. STATEMENT OF FACTS

On October 19, 2007, Leslie filed a complaint in the Circuit Court of Wirt County, alleging that Mr. Zach and Ms. Goeke were officers of "Wood Resources Company, "Complaint, ¶¶ 3-4,[1] which said complaint alleged was "a foreign limited liability company not authorized to do business in this State." *Id.* at ¶ 2. The complaint further alleged that Mr. Zach and Ms. Goeke had failed to pay the plaintiff for goods and

[1]The correct name of the business is "Wood Resource Company, LLC." It was misspelled in the original Complaint and many documents following. The Appellants have often used the misspelling for the sake of consistency.

services purchased on credit, and that they were, therefore, jointly and severally liable, along with two other defendants,[2] to the plaintiff for said debt. *Id.* at ¶¶ 6-7.

The plaintiff attempted to serve Mr. Zach with a copy of the Summons and Complaint by Certified Mail, Return Receipt Requested, at his address at 981 Carrizo Street, Los Lunas, New Mexico, and attempted to serve Ms. Goeke with the same by Certified Mail, Return Receipt Requested at 2532 Highway 103, West Point, Iowa. Civil Case Information Statement, certified mail receipts. The receipt for the attempted service upon Ms. Goeke apparently was not delivered to her at the West Point, Iowa residence, as it was signed for by Mr. Zach, who has never been to West Point, Iowa, most likely after being delivered to him at his Los Lunas, New Mexico address. Goeke certified mail receipt.

Although the plaintiff chose not to serve Mr. Zach or Ms. Goeke through the Office of the West Virginia Secretary of State, the plaintiff chose to have defendant Wood Resource Company served by this method, directing the Secretary of State to serve a copy of the Summons and Complaint upon this defendant at two addresses in West Virginia and one address in Ohio.

A default judgment against Mr. Zach and Ms. Goeke was entered on January 29, 2008 and filed by the Circuit Court of Wirt County on February 1, 2008. Order-02/01/08. As demonstrated in the attached Affidavit of undersigned counsel, the Appellants did not become aware of the judgment against them until counsel was alerted to the entry of such upon telephoning the lower court to schedule a hearing on a motion to dismiss that he planned to file. The order granting default judgment to the plaintiff was faxed by the

[2] The plaintiff also sought, and obtained, judgment against Wood Resource Company and Wendell L. Koprek, the two other defendants in the action being appealed. The judgment obtained against these defendants is not at issue in this appeal.

court to counsel on March 19, 2008, one or two days after counsel had learned of said judgment from the phone conversation. Less than one week after receiving the faxed order, the Appellants mailed to the Circuit Clerk of Wirt County for filing and served upon all other parties a motion to set aside the default judgment awarded the plaintiff and dismiss the action against the Appellants, based upon the fact that they had not been served in accordance with West Virginia's general "long arm statute" applicable to individual (as opposed to corporate) nonresident defendants, W. Va. Code § 56-3-33,[3] and that, therefore, the lower court lacked *in personam* jurisdiction over Mr. Zach and Ms. Goeke, the judgment against them was void, and the lower court lacked the legal authority to continue the action against them. *See generally*, Motion to Set Aside/Dismiss.

The lower court ruled that Mr. Zach and Ms. Goeke had received constructive service in accordance with WVRCP, Rule 4(e)(2), and that W. Va. Code § 56-3-33 expressly permitted service in the manner described by that Rule as a means of obtaining personal jurisdiction over a nonresident defendant. Order-05/27/08. The Wirt County court supported its ruling in stating that the *West Virginia Rules of Civil Procedure* provided the controlling law in the case where such Rules were in conflict with the West Virginia Code. *Id.* Additionally, the lower court found that Mr. Zach and Ms. Goeke "failed to show either good cause or excusable neglect" required to set aside the judgment. *Id.*[4]

[3] W. Va. Code § 56-3-33 gives a broad definition of "nonresident," which would include corporations and other entities as well as individuals. *Id.* at (e)(3). The *West Virginia Code* also contains a separate "long arm" statute reserved exclusively for foreign corporations. *See*, W. Va. Code § 31D-15-1510.

[4] No transcript is available for the May 12, 2008 hearing on the Petitioners' Motion (no court reporter was present). No testimony was taken and the arguments of counsel followed their respective Motions.

III. ASSIGNMENTS OF ERROR AND MANNER DECIDED BY LOWER COURT

A. Assignments of Error

1. **The lower court erred in ruling that *in personam* jurisdiction over out of state residents Christopher Zach and Ramona Goeke in the action brought by the plaintiff had been obtained by constructive service, pursuant to WVRCP, Rule 4(e)(2), and that service in this manner satisfied the state's general "long arm" statute for nonresident defendant, W. Va. Code § 56-3-33.**

2. **The lower court erred in ruling that the plaintiff complied with the requirements of WVRCP, Rule 4(e)(2) in attempting constructive service, pursuant to this Rule, upon Mr. Zach and Ms. Goeke.**

3. **The lower court erred in ruling that the *West Virginia Rules of Civil Procedure* could supply an independent basis for the lower court's assertion of *in personam* jurisdiction over Mr. Zach and Ms. Goeke in the action brought by the plaintiff.**

4. **The lower court erred in ruling that the default judgment granted the plaintiff should not be set aside as being "void," based upon the Circuit Court lacking *in personam* jurisdiction over Mr. Zach and Ms. Goeke, and in not thereafter dismissing the action against Mr. Zach and Ms. Goeke for the same reason.**

5. **The lower court erred in applying the rule for a motion to set aside a default judgment for the reasons of inadvertence or excusable**

neglect, rather than the test to set aside a void judgment, in ruling on the Appellants' motion.

B. Manner in which Errors Assigned were Decided by the Lower Court

1. The Circuit Court found that W. Va. Code § 56-3-33 expressly provided for service of the type utilized by the plaintiff (constructive service by certified mail, pursuant to WVRCP. Rule 4(e)(2)) as a means of asserting *in personam* jurisdiction over a nonresident defendant. In reaching this conclusion, the lower court seems to have relied in large part upon the plaintiff's assertion that the provision in subsection (f) of West Virginia's general "long arm" statute, W. Va. Code § 56-3-33(f), which states that "the provision for service of process herein is cumulative and nothing herein contained shall be construed as a bar to the plaintiff in any action or proceeding from having process in such action served in any other mode or manner provided by the law of this state," should be read so as to establish that W. Va. Code § 56-3-33(c) (and, presumably, similar code sections making the Secretary of State a statutory attorney in fact for nonresidents in certain circumstances)[5] does not limit the means for a court to assert *in personam* jurisdiction over a nonresident defendant, but instead provides for *in personam* jurisdiction over a nonresident defendant to be obtained through any manner of service of process authorized by West Virginia's Rules or Code.

2. The lower court simply stated that the plaintiff had "accomplished service of process" pursuant to WVRCP. Rule 4(e)(2).

[5] W. Va. Code § 56-3-31 provides for service in the same manner as W. Va. Code § 56-3-33(c), by delivering the Summons and Complaint to the Secretary of State, in the case of auto accidents by a nonresident. The same method of service of process in the case of foreign corporations is recognized by W. Va. Code § 31D-15-1510, (*previously* W. Va. Code § 31-1-15, *repealed*). W. Va. Code § 56-3-34 allows for the same in the case of nonresident bail bondsman.

3. The lower court found "that previous decisions of the W. Va. Supreme Court of Appeals have determined that where Rules of Civil Procedure and the Statutes of this State are in conflict, the Rules, as promulgated, shall control in matters in controversy." No authority was cited for the proposition that the *West Virginia Rules of Civil Procedure* could provide an independent basis for the assertion of *in personam* jurisdiction.

4. For the reasons discussed in the subsections above, the lower court found that it had *in personam* jurisdiction over Mr. Zach and Ms. Goeke. This finding precluded the lower from determining that the judgment obtained by the plaintiff was void.

5. Because of the rulings noted above, in which the lower court determined that it had *in personam* jurisdiction over Mr. Zach and Ms. Goeke, and that the default judgment entered against the Appellants was not void, the lower court reasoned that the test to set aside a void judgment was not available to the Appellants, and that the test for mistake, inadvertence, surprise, excusable neglect, or unavoidable cause provided the appropriate standard.

IV. POINTS AND AUTHORITIES RELIED UPON

Constitutional, Statutory and Court Rule References

West Virginia Court Decisions

Decisions from Other Jurisdictions

Other Sources

V. DISCUSSION OF LAW

A. STANDARD OF REVIEW

"A motion to vacate a judgment made pursuant to Rule 60(b), W. Va. R.C.P., is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion." Cales v. Wills, 212 W. Va. 232, 236, 569 S.E.2d 479, 483 (2002), Syl pt. 5, Toler v. Shelton, 157 W. Va. 778, 204 S.E.2d 85 (1974). On appeal, "the appellant bears the burden of showing that there was an error in the proceedings below resulting in the judgment of which he complains." Cales, 212 W. Va. at 236, 569 S.E.2d at 483, Syl pt. 2, Perdue v. Coiner, 156 W. Va. 467, 194 S.E.2d 657 (1973). However, this Court has stated that, "[w]here the issue on an appeal from the circuit court is clearly a question of law....we apply a *de novo* standard of review." Syl. pt. 1, in part, Chrystal R.M. v. Charlie A.L., 194 W. Va. 138, 459 S.E.2d 415 (1995)

In this case, no disputed issue of fact exists, and the decision reached by the Circuit Court was largely premised upon two erroneous conclusions of law: (1) that the court had obtained *in personam* over the nonresident Appellants through constructive service, as a result of the plaintiff's efforts at serving Mr. Zach and Ms. Goeke pursuant to WVRCP, Rule 4(e)(2); and (2) that the judgment entered against Mr. Zach and Ms. Goeke was not void (based upon the court's initial erroneous conclusion that it had jurisdiction over the Appellants), which permitted the court to apply the test for "excusable neglect," rather than for a "void judgment" in evaluating the Appellants' motion to set aside the judgment. These are clear issues of law and subject to *de novo* review by this Court.

B. THE LOWER COURT DID NOT HAVE *IN PERSONAM* JURISDICTION OVER MR. ZACH AND MS. GOEKE

1. W. Va. Code § 56-3-33 Provided the Exclusive Means by which the Court Could Have Acquired Jurisdiction over the Nonresident Appellants

In order for "a court to hear and determine an action, suit or other proceeding it must have jurisdiction of the subject matter and jurisdiction of the parties, both are necessary and the absence of either is fatal to its jurisdiction." State v. Hill, 208 W. Va. 163, 166, 539 S.E.2d 106, 109 (2000), *quoting* Syl. Pt. 3, State ex rel. Smith v. Bosworth, 145 W. Va. 753, 117 S.E.2d 610 (1960). The West Virginia Court has long recognized that *in personam* jurisdiction is required, *inter alia*, in an action "founded upon personal liability." Smith v. Smith, 140 W. Va. 298, 302, 83 S.E.2d 923, 925 (1954).

The *West Virginia Code* contains several sections allowing a West Virginia court to assert *in personam* jurisdiction over a nonresident, in the absence of service upon the nonresident in this State,[6] permitting such in the case of nonresident persons, W. Va. Code § 56-3-33, foreign corporations, W. Va. Code § 31D-15-1510, motor vehicle accidents, W. Va. Code § 56-3-31, and bail bondsman, W. Va. Code § 56-3-34. Each section provides for service upon the West Virginia Secretary of State, as a statutory attorney in fact, who will deliver the process to the nonresident defendant.[7] In this case, the provisions of W. Va. Code § 56-3-33 would be the only means available for the plaintiff to assert *in personam* jurisdiction over Mr. Zach and Ms. Goeke.

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[6] W. Va. Code § 56-3-33(a) specifically recognizes services within this State, which did not occur in the present action, as the traditional, unassailable means by which *in personam* jurisdiction may be acquired over a nonresident defendant.

[7] Previous versions of nonresident service of process statutes functioned in much the same manner as the current statutes, except that the Auditor, rather than the Secretary of State, was the official appointed as statutory attorney in fact, who would accept process on behalf of the defendant.

In applying the statutes for service of process on a nonresident (individual or corporate) this Court utilizes a two-part test, with both parts required to be satisfied before *in personam* jurisdiction may be asserted over the nonresident: (a) the defendant must be found to have committed an act specified by either the State's general "long-arm" statute, W. Va. Code § 56-3-33, or a second "long arm" statute applying specifically to corporations, W. Va. Code § 31D-15-1510; and (b) must be found to have contacts with West Virginia sufficient to satisfy federal due process requirements. Syl. Pt. 1 Easterling v. American Optical Corp., 207 W. Va. 123, 529 S.E.2d 588 (2000), Syl. Pt. 5 Abbott v. Owens-Corning Fiberglass Corp., 191 W. Va. 198, 444 S.E.2d 285 (1994). The nonresident then must be served in the manner described by the applicable statute for *in personam* to be obtained.

West Virginia Code § 56-3-33 holds that if a nonresident or his or her duly authorized agent should engage in any of seven specified acts within the state of West Virginia,[8] this shall be deemed the equivalent of appointing the Secretary of State as his/her attorney in fact, upon whom any action occurring in a Circuit Court of West Virginia may be served, for causes of action arising out of the seven specified acts. *Id.* at (a). Pursuant to the statute, service of process is made "by leaving the original and two copies of both the summons and complaint, and the fee required by section two, article one, chapter fifty-nine of this code with the Secretary of State," with the Secretary of State to then send a notice of said service, along with a copy of the summons and complaint, to the defendant by registered or certified mail. *Id.* at (c). The Court has noted

[8] (1) transacting business; (2) contracting to supply services or things; (3) causing tortious injury by act or omission; (4) causing tortious injury by act or omission committed outside the state if regularly doing business, persistently contacting, or obtaining revenue from state; (5) breaching warranty of products likely to be used in the state; (6) interest in real property; and (7) contracting to insure risk located in state. W. Va. Code § 56-3-33(a) (1)-(7).

the existence of a "general principle that where a particular method of serving process is prescribed by statute that method must be followed." McClay v. Mid-Atlantic Country Magazine, 190 W. Va. 42, 47-48, 435 S.E.2d 180, 185-86 (1993)(*per curiam*), *cited by*, Vass v. Volvo Trucks North America, Inc., No. 2:02-2286 (S.D. W. Va. 2004).

It is not disputed that Mr. Zach and Ms. Goeke are not residents of West Virginia, as attested to by the plaintiff in the Affidavit attached to the complaint it filed in this matter, Affidavit, ¶ 2, and by the fact that the plaintiff attempted a manner of service of the Summons and Complaint specifically reserved for nonresidents. *See*, WVRCP, Rule 4(e)(2). The plaintiff, therefore, would be required to serve the Appellants in accordance with W. Va. Code § 56-3-33 in order for the Circuit Court of Wirt County to have the *in personam* jurisdiction over Mr. Zach and Ms. Goeke required for the court to award the plaintiff monetary damages. It is not necessary to go through the test described above, however, and determine whether Mr. Zach and Ms. Goeke had contacts sufficient for West Virginia's "long arm" statute to apply and for State and Federal due process requirements to be satisfied,[9] as the plaintiff did not even attempt to serve the Petitioners in accordance with the provisions of the "long arm" statute, but instead sought to obtain *in personam* jurisdiction over Mr. Zach and Ms. Goeke through constructive service, pursuant to WVRCP, Rule 4(e)(2). Reply to Defendants' Motion to Set Aside Default Judgment (Reply), ¶ 3, Order-05/27/08. For the reasons discussed below, the constructive service attempted by the plaintiff was not sufficient to acquire *in personam* jurisdiction over Mr. Zach and Ms. Goeke, making void the judgment obtained against them.

[9] Due Process of law is guaranteed by the Fifth Amendment to the Constitution of the United States, and by Article III Section 10 of the West Virginia Constitution.

2. *In Personam Jurisdiction* Cannot be Obtained over a Nonresident through Constructive Service

The lower court ruled that constructive service, pursuant to WVRCP, Rule 4(e)(2), was sufficient for the court to assert *in personam* jurisdiction over the nonresident Petitioners. Order-05/27/08. The provision utilized by the plaintiff allows a nonresident to be served by the Circuit Clerk "sending a copy of the summons and complaint to the individual to be served by certified mail, return receipt requested, and delivery restricted to the addressee," pursuant to Rule 4(d)(1)(D), "when plaintiff knows the residence of a nonresident defendant....for which no officer, director, trustee, agent or appointed or statutory agent or attorney in fact is found in the State, upon which service may be had." *Id.* at 4(e)(2). In such case, the Rule states that "plaintiff shall obtain constructive service of the summons and complaint." *Id.*

In finding such service adequate to confer *in personam* jurisdiction, the lower court seems to rely on the plaintiff's contention that the provision in the State's general "long arm" statute, found at W. Va. Code § 56-3-33(f), which holds that "the provision for service of process herein is cumulative and nothing herein contained shall be construed as a bar to the plaintiff in any action or proceeding from having process in such action served in any other mode or manner provided by the law of this state, " should be read as granting the same effect of asserting *in personam* jurisdiction over a nonresident provided by section (c) of the "long arm" statute, to any other method of service authorized by Rules or statute. *See*, Reply to Motion to Set Aside Judgment ¶ 3.

The lower court's reading of W. Va. Code § 56-3-33(f) makes meaningless the intent of the statute (providing a means by which jurisdiction over a nonresident not served in the State may be had without violating Constitutional Due Process provisions)

and conflicts with established case law and the language and purpose of the *West Virginia Rules of Civil Procedure*. The United States District Court for the Northern District of West Virginia has noted that "[n]o statute or rule of the State of West Virginia,....provides that in personam jurisdiction can be had over a non-resident served outside of the state." Fabian v. Kennedy, 333 F. Supp. 1001, 1005 (N.D. W. Va. 1971)(ruling that jurisdiction could not be had, pursuant to Rule 4(e) of the *Federal Rules of Civil Procedure*, which allows for service to be obtained pursuant to the law of the state in which the federal district court is located)(*cited by*, McClay, 190 W. Va. 42, 435 S.E.2d 180 (fn. 4).

"Under West Virginia law, a judgment that operates *in personam* cannot be rendered against a defendant upon whom only constructive service has been executed." Central Operating v. Utility Workers of America, 491 F.2d 245, 251 (4th Cir. 1974), *citing* Fabian, 333 F. Supp. 1001. Dismissal of an action is mandatory where only constructive service was obtained in a case where the type of judgment sought required *in personam* jurisdiction over a party. *See*, Barnes v. International Amateur Athletic Fed'n, 862 F. Supp. 1537, 1541 (S.D. W. Va. 1993), *citing*, Teachout v. Larry Sherman's Bakery, Inc., 158 W. Va. 1020, 1022, 216 S.E.2d 889, 891 (1975)("recognizing well-established rule that service of process outside state on nonresident defendant does not confer personal jurisdiction over the defendant").

The West Virginia Court has found service by mail to a nonresident's defendant's corporate headquarters, McClay, 190 W. Va. 42, 435 S.E.2d 180, and service by mail to a individual nonresident defendant's residence, Teachout, 158 W. Va. 1020, 216 S.E.2d 889, insufficient to establish *in personam* jurisdiction over the nonresident defendants. A similar conclusion should result in this matter, where the plaintiff below attempted to

obtain *in personam* jurisdiction over the nonresident Appellants by having the summons and complaint mailed to their respective addresses.

3. The *West Virginia Rules of Civil Procedure* Provides No Independent Basis for Establishing *In Personam* Jurisdiction

West Virginia Rules of Civil Procedure, Rule 82, unequivocally states that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the courts or the venue of actions therein." Therefore, contrary to the lower court's assertion, the Rules can provide no independent basis for establishing *in personam* jurisdiction in a particular action, and no "conflict" between the Rules and the *West Virginia Code* on the issue of jurisdiction is possible.

4. *West Virginia Rules of Civil Procedure*, Rule 4(e)(2), is not Available to the Plaintiff as a Manner of Service in this Action

As demonstrated in the subsection above, the *West Virginia Rules of Civil Procedure* provides no independent basis for the establishment *in personam* jurisdiction. Even if the Rules could serve such a function, however, the "conflict" the lower court ascertained between W. Va. Code § 56-3-33 and WVRCP, Rule 4(e)(2) would not be present.

Even if, contrary to the clear statement provided by WVRCP, Rule 82, the *West Virginia Rules of Civil Procedure* were able to offer an independent basis for the assertion of *in personam* jurisdiction, Rule 4(e)(2) would still not be available to the plaintiff as a method of service in this action, as a means by which personal jurisdiction over the Appellants could be asserted. Rule 4(e)(2) specifically allows for constructive service by certified mail upon a nonresident defendant "for which no officer, director, trustee, agent, *or appointed or statutory agent or attorney in fact* is found within the State

upon whom service may be had. (*emphasis added*). As noted, W. Va. Code § 56-3-33(a) establishes that, when any act listed in seven subsections (each of which could provide the basis for a claim for monetary damages or other relief requiring *in personam* jurisdiction) has occurred, the Secretary of State is deemed to be the defendant's "lawful attorney upon whom may be served all lawful process in any action or proceeding against him or her."

A juxtaposition of WVRCP, Rule 4(e)(2) and W. Va. Code § 56-3-33 will show that in no case could service according to said Rule provide for the assertion of *in personam* jurisdiction over a nonresident defendant, as in such a case, only two scenarios are possible, both of which fail to give rise to *in personam* jurisdiction: (1) the cause of action did not grow out of one of the seven acts listed in W. Va. Code § 56-3-33(a), in which case the first prong of the Court's test to determine whether *in personam* jurisdiction over a nonresident existed would not be satisfied, *See*, Syl. Pt. 1 Easterling v. American Optical Corp., 207 W. Va. 123, 529 S.E.2d 588 (2000), Syl. Pt. 5 Abbott v. Owens-Corning Fiberglass Corp., 191 W. Va. 198, 444 S.E.2d 285 (1994), *supra.*, and personal jurisdiction could not be found, or (2) the cause of action arose from one of the seven acts listed W. Va. Code § 56-3-33(a), in which case the Secretary of State would have become the nonresident's statutory attorney in fact, and WVRCP, Rule 4(e)(2), thus, would not be available as a method of service of the summons and complaint upon the nonresident.

The Appellants do not dispute that the plaintiff could prove the existence of one of the seven acts contained in W. Va. Code § 56-3-33(a), therefore, by virtue of said Code section, Mr. Zach and Ms. Goeke had, in the Secretary of State, a statutory attorney

in the State, upon whom service of process could be made by the plaintiff. The constructive service provided by WVRCP, Rule 4(e)(2), thus, was not available to the plaintiff, and is unlikely to be available in the case of an action where a plaintiff seeks to impose personal liability upon a nonresident, or seeks other relief requiring *in personam* jurisdiction. The Rule subsection is, therefore, crafted to regulate opportunities for constructive service consistent with the law contained in the *West Virginia Code*, by making constructive service appropriate only in cases where *in personam* jurisdiction is not likely to be required. It is clear, therefore, that the Wirt County Circuit Court did not acquire *in personam* jurisdiction over Mr. Zach and Ms. Goeke by virtue of the method of service of process selected by the plaintiff.

5. The Plaintiff's Attempted Service upon Mr. Zach and Ms. Goeke, Pursuant to WVRCP, Rule 4(e)(2), was Insufficient to Confer *In Personam* Jurisdiction, as the Plaintiff Failed to Comply with the Requirements of Said Rule

Even if it were determined that constructive service, pursuant to WVRCP, Rule 4(e)(2), provided a sufficient basis for a West Virginia court to assert *in personam* jurisdiction over a nonresident defendant, the plaintiff's failure to follow said Rule in this action would be fatal to the plaintiff's attempt at acquiring *in personam* jurisdiction over Mr. Zach and Ms. Goeke in its action. As previously noted, Rule 4(e)(2) permits service "by the method set forth in Rule for (d)(1)(D)" under conditions (more particularly described above), *inter alia*, where the plaintiff knows the defendant's residence and no person upon whom service may be had is found within the State.

WVRCP, Rule 4(d)(1)(D) permits service to be effected by "[t]he clerk sending a copy of the summons and complaint to the individual to be served by certified mail, return receipt requested, *and delivery restricted to the addressee*." (*emphasis added*). As

shown by the return cards contained in the case file, mail was not restricted to the addressee in the case of attempted service upon either Appellant and, in the case of service attempted upon Ms. Goeke, such was even signed for by Mr. Zach as her "agent," in direct violation of the Rule.

As "[s]ervice of process is the 'physical means by which jurisdiction is asserted.'" McClay, 190. W. Va. at 44, 435 S.E.2d at 182, *quoting*, Terry v. Raymond International, Inc., 658 F.2d 398 (5th Cir. 1981), *supra.*, the plaintiff's failure to follow the method provided by WVRCP, Rule 4(e)(2) would mean that *in personam* jurisdiction over the Appellants by the Wirt County Circuit Court would not be present, even in the case that said Rule provided a means for acquiring such jurisdiction over a nonresident defendant. Since the lower court never acquired *in personam* jurisdiction over Mr. Zach and Ms. Goeke, the default judgment granted the plaintiff is void, and must be dismissed for the reasons discussed below.

C. THE DEFAULT JUDGMENT GRANTED THE PLAINTIFF IS VOID

The Default judgment granted the plaintiff by the Wirt County Circuit Court is void under West Virginia law. As previously noted, this Court has observed that a cause of action cannot proceed in the absence of jurisdiction over both the person and the subject matter. *See*, Hill, 208 W. Va. at 166, 539 S.E.2d at 109, Bosworth, 145 W. Va. 753, 117 S.E.2d 610, *supra*. The Court has further declared to be void any judgment entered without both bases of jurisdiction satisfied, Hill, 208 W. Va. at 166, 539 S.E.2d at 109, ("In order to render a valid judgment or decree, a court must have jurisdiction both of the parties and of the subject matter and any judgment or decree rendered without such

jurisdiction will be utterly void."), Syl Pt. 1, Schweppes U.S.A. Ltd. v. Kiger, 158 W. Va. 794, 214 S.E.2d 867 (1975).

As the Wirt County Court never acquired *in personam* jurisdiction over Mr. Zach and Ms. Goeke, the judgment granted the plaintiff is, thus, void and should be set aside for the reasons described below.

D. THE APPELLANTS ARE ENTITLED TO HAVE THE JUDGMENT ENTERED AGAINST THEM SET ASIDE

1. The Test for Ruling on a Rule 60(b)(4) Motion is that the Judgment was Void and that the Motion Requesting Relief was Filed within a Reasonable Time

Rule 60(b) of the *West Virginia Rules of Civil Procedure* permits a court to relieve a party of a final judgment in the case of:

> (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; *(4) the judgment is void;* (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. (*emphasis added*).

The trial court, when considering a motion to set aside a judgment brought under Rule 60(b)(1) (and, presumably, under Rule 60(b)(2) and (3) as well) "should consider: (1) The degree of prejudice suffered by the plaintiff from the delay in answering; (2) the presence of material issues of fact and meritorious defenses; (3) the significance of the interests at stake; and (4) the degree of intransigence on the part of the defaulting party." Syl. Pt. 2, in part, Jackson General Hosp. v. Davis, 195 W. Va. 74, 464 S.E.2d 593

(1995), Syl. Pt. 3, Parsons v. Consolidated Gas Supply Corp., 163 W. Va. 464, 256 S.E.2d 758 (1979).

A different standard is applied, however, in ruling on a motion to set aside a void judgment, filed pursuant to WVRCP, Rule 60(b)(4). In such case, this Court has applied a two prong test, whereby the movant must first meet "the specific requirement of Rule 60(b)(4), by demonstrating that the judgment is void," and then, with the first prong of the test satisfied, the movant need only show that the motion for relief was filed within a reasonable time. Evans v. Holt, 193 W. Va. 578, 587, 457 S.E.2d 515, 524 (1995).

In this case, the lower court erred by first determining that the default judgment granted the plaintiff below was not void, and then by applying the test for a motion to set aside based upon excusable neglect, rather than the test applicable to a void judgment. In applying the incorrect test, the lower court concluded that Mr. Zach and Ms. Goeke "failed to show either good cause or excusable neglect," Order-05/27/08, and denied their motion on that basis. The lower court, thus, denied the Appellants' motion based upon criteria inapplicable to determining the validity of a Rule 60(b)(4) motion to set aside a void judgment. As demonstrated below, if the Appellants'' motion would have been evaluated according to the test provided by this Court for Rule 60(b)(4) motions, the trial court would have found that the Appellants acted within a reasonable time, and that their motion should be affirmed, and the judgment against them set aside.

2. The Majority Rule Holds that a Motion to Set Aside a Void Judgment May be Brought at any Time

In requiring a motion challenging a void judgment to be filed "within a reasonable time," West Virginia has adopted the minority approach to setting aside void judgments, which places a greater burden on the party seeking relief from the court. *See generally,*

47 Am. Jur.2d, Judgments § 675. The majority rule holds that the timeliness standard for motions to set aside judgments does not apply where the judgment is attacked on the basis of being void, and that a motion to set aside a void judgment can be filed at any time. Mother's Restaurant, Inc. v. Krystkiewicz, 861 A.2d 327 (Pa. Super. 2004); E.S.R. v. Madison County Dep't Hum. Res., No. 2060800 (Ala. Civ. App. 3-28-2008); Rinas v. Rinas, 847 So.2d 555, 557 (Fla. App. 2003)("a judgment alleged to be void may be attacked at any time because the [void] judgment creates no binding obligations on the parties {and} is legally ineffective and is a nullity." *quoting*, Griesel v. Browne, 733 So.2d 1119, 1121 (Fla. App. 1999); Revolution Portfolio, LLC v. Beale, 793 N.E.2d 900, 903 (Ill. App. 2003)("The law is well settled that a void order or judgment can be attacked at any time or in any court, in either a direct or collateral proceeding."); In Re: A.B.D., 617 S.E.2d 707 (N.C. App. 2005)("a motion made pursuant to Rule 60(b)(4), to set aside a void judgment, may be made at any time."); In Re: Estate of Davis, 132 P.3d 609 (Ok. Civ. App. 2006); Estate of Hutchins v. Fargo, 72 P.3d 638 (Ore. App. 2003); McGuire v. Champion Fence & Constr., Inc., 104 P.3d 327 (Colo. App. 2004); Garcia v. Garcia, 712 P.2d 288 (Utah 1986). Under this rule, "there is no time limit in which a motion for a void judgment must be brought....and the court must vacate such a judgment even in the case of unreasonable delay by the party seeking relief." Master Financial, Inc. v. Woodburn, 90 P.3d 1236, 1240 (Ariz. App. 2004)(ruling on motion to set aside under state Ariz. R. Civ. P., Rule 60(c)(4).

3. The Appellants' Motion was Filed within a Reasonable Time of Learning of the Judgment against Them

In applying the "reasonable time" test, this Court found a motion to set aside a void judgment to have been filed within a reasonable time where such was filed 30 days

after receiving notice of entry of the judgment, and fourteen months after the judgment itself had been entered. Evans, 193 W. Va. at 587, 457 S.E.2d at 524.

Other jurisdictions applying the "reasonable time" test to motions to set aside void judgments have found far more significant delays than that considered by the *Evans* court to constitute filing within a reasonable time. *See, e.g.*, Stidham v. Whelchel, 698 N.E.2d 1152 (Ind. 1998)(17 years); Thomison v. IK Indy, 858 N.E.2d 1052 (Ind. App. 2006)(5 years); Rogers Group, Inc. v. Masterson, 175 S.W.3d 630 (Ky. App. 2005)(3 years); State Street Bank v. Inversiones Errazuriz, 374 F.3d 150 (2nd Cir. 2004)(5 years)[10].

This case involves with a far less significant delay in filing a motion to set aside a default judgment than was present in *Evans* and decisions from foreign jurisdictions. The motion to set aside the void judgment awarded the plaintiff below was filed a mere seven weeks after the entry of said judgment, and slightly more than one week after Mr. Zach and Ms. Goeke, through counsel, learned of the entry of said judgment. This brief time is so clearly within the parameters of "reasonable time" established by this Court for Rule 60(b)(4) motions, that it would be appropriate for the Court to conclude, as a matter of law, that the Petitioners' motion to set aside was filed within a reasonable time, without remanding the case to the lower court for a finding based upon the "reasonable time" standard, rather than the "excusable neglect" test applied by the lower court.

[10] Other federal circuits apply the majority rule, finding no timeliness requirement for motions to set aside a void judgment. Homer v. Jones-Bey, 415 F.3d 748, 752 (7th Cir. 2005)("a movant may attack the judgment for lack of jurisdiction over the person at any time since a judgment rendered without jurisdiction over the person [is] void."), Robinson Engineering Co. Pension Plan and Trust v. George, 223 F.3d 445, 453 (7th Cir. 2000); *quoting*, Taft v. Donellen Jerome, Inc., 407 F.2d 807, 808 (1969).

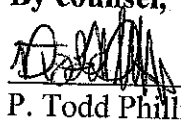
E. THE DEFAULT JUDGMENT GRANTED THE PLAINTIFF BELOW SHOULD BE SET ASIDE, AND THE ACTION AGAINST THE APPELLANTS DISMISSED

For the reasons discussed above, the Court should rule that the default judgment granted the plaintiff below should be set aside and the action against Mr. Zach and Ms. Goeke dismissed. This ruling should be predicated upon concluding that: (a) the lower court did not obtain personal jurisdiction over Mr. Zach and Ms. Goeke by way of the constructive service attempted by the plaintiff, pursuant to WVRCP, Rule 4(e)(2); (b) by virtue of the faulty service noted above, the judgment obtained against Mr. Zach and Ms. Goeke is void; (c) the lower court applied an incorrect test in ruling on the Appellants' motion to set aside the default judgment granted to the plaintiff; and (4) Mr. Zach and Ms. Goeke's Motion to Set Aside Default Judgment was filed within a reasonable time as a matter of law.

VI. RELIEF PRAYED FOR

Mr. Zach and Ms. Goeke pray that this Court reverses the decision of the Wirt County Circuit Court, sets aside the default judgment granted to the plaintiff below, and dismisses the action against them for lack of *in personam* jurisdiction.

RESPECTFULLY SUBMITTED,
CHRISTOPHER ZACH & RAMONA C. GOEKE,
APPELLANTS,
By counsel,



P. Todd Phillips
WV State Bar #9499
235 High Street
Suite 322
Morgantown, WV 26505
(304) 296-3200 phone
(304) 413-0202 fax

ATTACHMENTS

A. Affidavit of Undersigned Counsel

B. Order Entering Default Judgment - Faxed to Undersigned Counsel

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

Leslie Equipment Company, a West Virginia corporation, Plaintiff Below, Appellee

vs.) No. 34712

Wood Resources Company, L.L.C., Christopher Todd Zach, individually and d/b/a/ Wood Resources Company, L.L.C., Ramona C. Goeke, individually and d/b/a Wood Resources Company, L.L.C., and Wendell L. Koprek, individually and d/b/a/ Wood Resources Company, L.L.C., Defendants Below

Christopher Todd Zach and Ramona C. Goeke, Appellants

AFFIDAVIT OF UNDERSIGNED COUNSEL

I, P. Todd Phillips, counsel for the Appellants and defendants below, Christopher Todd Zach and Ramona C. Goeke, being fist duly sworn, do hereby affirm the following:

1. After being retained by the Appellants to represent them on in the action below and subject matter of this appeal, brought against them by Appellee and plaintiff below, Leslie Equipment Company, I drafted a Motion to Dismiss, which was never filed, based upon the Wirt County Circuit Court lacking *in personam* jurisdiction over Mr. Zach and Ms. Goeke.
2. I then telephoned the office of Wirt County Circuit Court Judge Robert A. Waters on March 17 or 18, 2008 to schedule a hearing on the motion I planned to file, the Notice for which I planned to attach to said motion.
3. At that time I was informed by Judge Water's office that a default judgment had been granted to the plaintiff below. This was the first time

that either the Appellants or their counsel had been aware of the entry of a default judgment against the Appellants.

4. At my request, a copy of the order granting a default judgment to the plaintiff below was faxed to me on March 19, 2008.

5. I then drafted a Motion to Set Aside Default Judgment and Dismiss Action Based upon Judgment Being Void for Lack of Jurisdiction, the denial of which is being appealed to this Court, mailed said motion to the Circuit Clerk of Wirt County for filing, and served the same upon all other parties to the action on March 25, 2008.

And further this Affiant saith not.

P. Todd Phillips

STATE OF WEST VIRGINIA,
COUNTY OF MONONGALIA, To-wit:

Taken, sworn, subscribed to and acknowledged before me by **P. Todd Phillips** this 26th day of February, 2008.

Notary Public

8-30-17
My commission expires

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
STEPHANIE R. GIBSON
SAMUEL I. WHITE PC
235 HIGH ST. SUITE 311
MORGANTOWN, WV 26505
My commission expires August 30, 2017

IN THE CIRCUIT COURT OF WIRT COUNTY, WEST VIRGINIA

LESLIE EQUIPMENT COMPANY,
A West Virginia Corporation,
Plaintiff,

vs.

Civil Action No. 07-C-35

WOOD RESOURCES COMPANY, L.L.C.
CHRISTOPHER TODD ZACH, individually
and d/b/a Wood Resources Company, L.L.C.,
RAMONA C. GOEKE, individually and
d/b/a Wood Resources Company, L.L.C., and
WENDELL L. KOPREK, individually and
d/b/a Wood Resources Company, L.L.C.
Defendants

ORDER

This day came Plaintiff, Leslie Equipment Company, a West Virginia Corporation, by Counsel, David H. Wilmoth, and presented the Court with a Motion for Default Judgment in favor of Plaintiff and against Defendants, Wood Resources Company, L.L.C., Christopher Todd Zach, individually and d/b/a Wood Resources Company, L.L.C., and Ramona C. Goeke, individually and d/b/a Wood Resources Company, L.L.C., along with supporting affidavits. The Court, having reviewed the file and the pleadings being of the opinion that Plaintiff is entitled to default judgment pursuant to Rule 55 W.Va. R. Civ. Pro., does hereby

ORDER that judgment be and hereby is entered in favor of Plaintiff, Leslie Equipment Company, a West Virginia Corporation, and against Defendants, Wood Resources Company, L.L.C., Christopher Todd Zach, individually and d/b/a Wood Resources Company, L.L.C., and Ramona C. Goeke, individually and d/b/a Wood Resources Company, L.L.C.; jointly and severally, in the amount of $22,459.70, Plaintiff's costs and interest at the legal rate until satisfied. There being nothing further this matter is to be removed from the active docket of this Court, and a copy of this Order sent to all parties.

Enter this 29th day of January, 2008.

CIRCUIT JUDGE

Prepared by:
David H. Wilmoth
Counsel for Plaintiff
P.O. Box 933
Elkins, WV 26241
(304) 636-9425